

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1508

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA :

vs. :

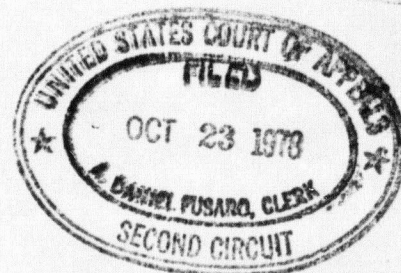
SIDNEY S. REYNOLDS, :

Appellant. :
-----x

B
P/s

ANDERS BRIEF
BRIEF FOR APPELLANT
AND APPENDIX

PETER LUSHING
Attorney for Appellant
55 Fifth Avenue
New York, New York 10003
790-0268



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA :
 : 77-1508
vs. :
SIDNEY S. REYNOLDS :
-----X

BRIEF FOR APPELLANT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, Ch. J., sentencing appellant to the custody of the Attorney General of the United States for a term of four years and eight months on count 1, suspending imposition of sentence on count 2, and placing appellant on probation for a term of two years, said term to commence at the end of the prison term, this sentence having been imposed after a finding that appellant violated probation and probation having been revoked.

This brief is submitted by counsel assigned by this Court pursuant to Anders v. California, 386 U.S. 738 (1967), counsel having found that this appeal is wholly frivolous.

In 1974 appellant pled guilty in the United States District Court for the Western District of Pennsylvania to two counts of fire arms violations under a 1973 indictment, the offenses having been committed in 1972.

Appellant was sentenced under count 1 to five years, to serve four months, the balance of the term suspended and appellant placed on probation. Imposition of sentence was suspended on count 2.

Subsequent to an arrest for attempted armed robbery in 1975, appellant pleaded guilty in 1977 in the Supreme Court of the State of New York, County of New York, to grand larceny in the third degree, and was sentenced to eight months.

Later in 1977 appellant was charged with violation of probation as a result of this crime and another offense committed in New York involving theft and resisting arrest, which resulted in a sentence of six months in New York City Criminal Court, County of New York. The charge of violation of probation came on for adjudication in the court below. Appellant took the position before Chief Judge Mishler that while he had resisted arrest, he had not stolen during that transaction, and that his plea of guilty to grand larceny in the other case was admission that he stole property from the person of another, but he had not committed or attempted an armed robbery with a shotgun, as alleged. According to counsel below, appellant was "prepared to plead guilty to a violation of probation," but insisted he had not been knowingly involved in an armed robbery. Counsel desired a hearing on the issue not of guilt of violation of probation, but on the facts of the transaction as they would bear on sentence.

The court below proceeded with the hearing, and the Government called several witnesses to the alleged robbery, including the victim. Appellant himself testified and portrayed the "robbery" as a feud over a sale of phoney heroin.

Counsel for appellant has studied the record of the hearing, as well as the entire record in the case, and has determined that no issues were raised by the manner in which the hearing was conducted. As stated above, the only question litigated in the court below was not guilt of violation of probation, but the circumstances as they would bear on sentence. In his Memorandum of Decision and Order, Chief Judge Mishler credited the Government's version of the facts, finding that appellant committed a shotgun robbery, and made no finding that a sale of drugs had been involved. Since there was testimony supporting the judge's findings, and the issues of fact at the hearing boiled down to credibility of the witnesses, there is no way of attacking those findings on appeal. At sentencing, moreover, Chief Judge Mishler assumed for the sake of argument that the transaction did involve drugs, thereby giving appellant the benefit of his own version of the incident.

In sum, the court below proceeded on the basis of facts admitted by appellant--which facts amounted to a violation of probation--and sentenced appellant on appellant's theory of the case. Sentence, of course, is not reviewable for harshness on this appeal. The

court below has since denied a pro se motion to resentence.

In view of the findings set forth in the court's memorandum below, some doubt must be felt as to whether the court did, indeed, sentence appellant on the basis of contrary assumptions of fact. But the impossibility of demonstrating on the record that the judge was not being candid, combined with undisputed allegations that amount to a violation of probation in any event, makes litigation of this appeal on that basis hopeless. Assigned counsel for appellant can find nothing else to raise. Appellant was represented by counsel below, who seemingly performed quite ably. The proceeding stretched out over several months, with hearings and appearances on several dates, so no question of counsel not having time to prepare can be raised--nor was raised. Present assigned counsel sincerely believes it his responsibility to represent to this Court that this appeal is frivolous, and requests that his duties in the matter go no further than the filing of this brief.

Respectfully submitted,

PETER LUSHING
Attorney for Appellant
55 Fifth Avenue
New York, New York 10003
790-0268

New York, New York

October 1978

Substrate American U.S.

1

Office

77CR 2

SIDNEY S. REYNOLDS

(LAST FIRST MIDDLE)

MISHLER, J.

177

OFFENSES CHARGED

18:922(a)(6) Did possess a firearm and did
924(a)1202(a) make false statements re previous
(1) Appendix conviction



SENTENCE

Disposition of Charge

☐ Convicted ☐ On All Charges
☐ Acquitted ☐ On Lesser Offense(s)
☐ Dismissed ☐ WOP ☐ WFF
☐ On Government Motion

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began	High Risk Date	Information ☐	Trial Set For	Ver. Due ☐
Summons Served	Indict. Waived ☐	1st Plea	☐ Guilty ☐ Not Guilty	☐ Convicted ☐ On All Charges
First Appearance	In Charging District	Final Plea	☐ Guilty ☐ Not Guilty	☐ Acquitted ☐ On Lesser Offense(s)
	Superseding Indictment ☐			☐ Dismissed ☐ WOP ☐ WFF
				☐ On Government Motion

MAGISTRATE		OUTCOME
Search Warrant	DATE	INITIAL/NO.
Issued		
Return		
Summons		
Issued		
Served		
Arrest Warrant Issued		
COMPLAINT		
OFFENSE (In Complaint)		

U.S. Attorney or Asst.

ATTORNEYS

Defense ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Frank A. Bress
310 Madison Avenue,
New York, New York 10017
(212) 367-1016

* Show last names and S.A. numbers of other defendants on same indictment information

DATE	(DOCUMENT NO.)	PROCEEDINGS
5-24-77		Transfer of Jurisdiction Form #22, Judgment & Commitment, Indictment, filed received from Clerk, Northern District of Ohio. (Prob. notified) Deft indicted July 27, 1973 - Papers received in Clerks office for transfer of jurisdiction 5-24-77.
5-31-77		Before Mishler, Ch J - Hearing on violation of probation adjd to June 2, 1977.
6.2.77		Letter filed received from Chambers addressed to Judge Mishler from Frank A. Bress confirming the adjdment.
6.2.77		Notice of Appearance filed.
6.2.77		Before Mishler, J. - Case Called. Deft. not present. Counsel present. Hearing on violation of probation adjd to 6.7.77 at 9:30 A.M.
6-2-77		Before Mishler, Ch J - case called - deft & atty F. Bress present - trial on defts violation of probation to be held. No date set at this time.
6/28/77		Sten's transcript dtd 6/7/77 Filed, [1]

77/508

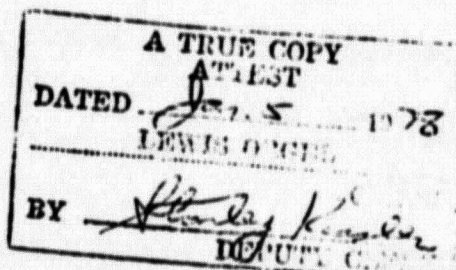
EP

SP

IV. PROCEEDINGS

DOCUMENT NO.

- 4/77 Before Mishler, Ch J-case called probations & present-hearing held on violation of prob. to be contd on 9/2/77-both sides to submit as indicated on the record. [11]
- 9.02.77 Before Mishler, J.- Case Called. Deft & Counsel present. Hearing resumes. Hearing concluded. Adj'd. without date for further consideration.
- 9-6-77 Transcript filed dated 7-22-77
- 9-29-77 Transcript filed dated Sept. 2, 1977. (page 152 to 237)
- 9-29-77 Before Mishler, Ch J - case called - deft & atty Frank Bress present - hearing contd from 9-2-77; hearing concluded - decision reserved.
- 10-3-77 Violation of probation report. mg
- 10-3-77 Memo to J. Mishler from James F. Haran with Letter dtd 9-7-77 to J. Stein, ED/PO from Dennis R. Gustafson ND of Ohio. mg
- 10-3-77 Copy of memo from Ch.J. Mishler to Calendar re sentence is scheduled for 11-4-77. mg
- 10-4-77 By MISHLER, CH,J-Memo of decision & order dtd 9-30-77 revoking deft's probation and directing that he be produced on 11-4-77 @ 11:am for sentencing. mg
- 1-4-77 Before Mishler, Ch J - case called on violation of probation - deft & atty Frank Bress present - probation is revoked after court hearing - deft is sentenced to imprisonment on count 1 for the balance of his sentence to wit: 4 years and 8 months under 18:42e5(b)(2). Imposition of sentence is suspended on count 2 and deft placed on probation for 2 yrs. Said probation to commence at the end of prison term.
- 11-4-77 Judgment and commitment and order of probation filed - certified copies to Probation & Marshal.
- 11-10-77 Violation of probation judgment retd and filed - deft. del. to Warden, MEC. NY.
- 11-17-77 Notice of appeal filed - docket entries and duplicate of notice mailed to the court of appeals
- 12-7-77 Scheduling order received from Court of Appeals and filed, that the record on appeal be filed on or before 12-9-77. sk
- 1-5-78 Record on appeal certified and mailed to Court of Appeals with certified copies of docket entries. sk



FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

Deputy Clerk

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ OCT 4 1977 ★

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

77 CR 291

UNITED STATES OF AMERICA

-against-

Memorandum of Decision
and Order

SIDNEY S. REYNOLDS,

FILED

Defendant.

September 30, 1977

A P P E A R A N C E S :

HONORABLE DAVID G. TRAGER
UNITED STATES ATTORNEY
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
By: Allyne Ross, Esq., Assistant United
States Attorney, of counsel.

FRANK BRESS, ESQ.
Attorney for Defendant
80 Fifth Avenue
New York, New York

MISHLER, CH. J.

Defendant pled guilty in the United States
District Court for the Western District of Pennsylvania,
on June 4, 1974, to two counts of fire arms violations:

Count One: Making a false and fictitious statement with respect to information required by the Firearms Act (18 U.S.C. §921 et seq.) in that he stated in writing, in violation of 18 U.S.C. §§922(a)(6) and 924(a), that he had not been convicted of any crime punishable by imprisonment for a term exceeding one year, knowing that he had been convicted of such a crime;

Count Two: Knowingly possessing the firearm, i.e., a .12 guage shotgun, in violation of 18 U.S.C. App. §1202((Pub.L. 90-351) Title VII, 82 Stat. 236 as amended).

Defendant was sentenced by United States District Judge Louis Rosenberg to a term of five (5) years, pursuant to 18 U.S.C. §3651, to serve four (4) months, the balance of the term suspended and the defendant placed on probation for five (5) years. Imposition of the sentence was suspended on Count Two. As a special condition of probation, defendant was directed to refrain from using alcohol and drugs.

Jurisdiction over defendant during the probationary period was transferred to the Northern District of Ohio on October 2, 1974, and then to this district on May 24, 1977.

Defendant is before this court on charges made by the Probation Department that defendant violated the

terms of probation in that:

(1) he violated state law in that he committed the crime of robbery, criminal possession of a weapon, reckless endangerment and unlawful imprisonment of the victim of the robbery (Condition (1)); and

(2) he left the judicial district without permission of the probation officer.

The court held a hearing. The court finds:

In September 1975, while under the jurisdiction of the Northern District of Ohio, defendant was charged with stealing a bicycle. He left Canton, Ohio, for New York^{/1} with his wife and six-year old son. He visited with his mother-in-law for a few days in Columbus, Ohio, where he met one Clarence Williams. Williams joined the group in their journey to New York armed with a shotgun.

Defendant and Williams (together with defendant's wife and son) arrived in the Harlem section of New York in the late afternoon of September 12, 1975. They planned an armed robbery. Prior to 9:30 P. M., they took

^{/1}

The court rejects defendant's version as to the reason for leaving the jurisdiction, i.e., to find William Cook, who was then in New York, and seek his testimony which would exculpate him on the charge of stealing the bicycle.

positions at the entrance of a building known as 2113 8th Avenue (between 113th and 114th Streets), waiting for their prey.¹² Williams, who was of slight build, wore defendant's oversized coat to conceal the loaded shotgun. Miss Linda Calloway arrived at the building at about 9:30 P. M. After she entered the building, defendant and Williams followed. Williams gave defendant the shotgun which he, in turn, pointed at Miss Calloway's head demanding all her money and valuables. She turned her purse over to defendant and offered him her jewelry. Miss Calloway's screams brought her boyfriend, Raphael Rogers, to the scene. Defendant turned the gun on Rogers, who was at the entrance door. Others were attracted to the premises. Williams made his way through the crowd to the side of 8th Avenue. Defendant took Miss Calloway hostage and held the crowd off by threatening to kill her. With his victim in tow, and alternately pointing the gun at Miss Calloway and the mob, he made his way to 112th Street where he pushed her into the entrance of a bar at that corner. Defendant attempted

¹² Defendant's wife and son remained in the car parked near the premises.

to escape by running up 112th Street. Defendant's wife, driving his car, attempted to aid him in his escape, but failed. Defendant was hit by a bullet fired by someone unidentified. It entered the left side of his neck, fracturing the jawbone and teeth and exited at the lower right lip. Defendant ran into a building known as 310 112th Street with the mob in hot pursuit. He turned them back by training the shotgun on them from the landing. While bleeding profusely from the wound, he forced his way into an apartment (apartment W, occupied by a Mr. Andy Andrews) and escaped by way of the fire escape. Defendant was arrested by New York City police at a hospital he had entered for treatment of his wound.

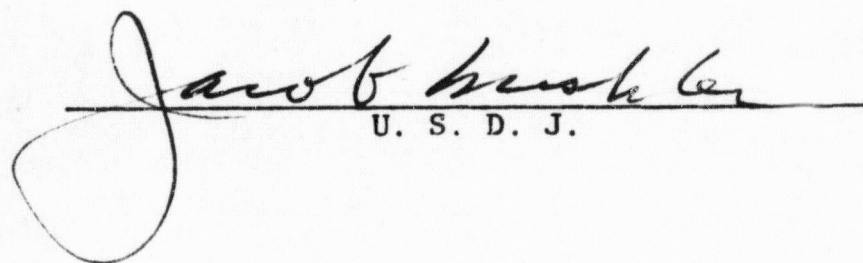
On April 27, 1977, defendant pleaded guilty to grand larceny in full satisfaction of all the charges arising from the events of September 12, 1975. He was sentenced to a term of eight (8) months to run concurrently with the sentence imposed on an unrelated theft (which occurred on November 24, 1976).

Defendant violated the terms of probation imposed by Judge Rosenberg on June 4, 1974, in that he was convicted of grand larceny. Probation is revoked, and

it is

SO ORDERED.

Defendant is directed to be produced for sentencing on Friday, November 4, 1977, at 11:00 A. M.


U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ NOV 4 1977 ★

TIME A.M. _____
P.M. _____

-----X

UNITED STATES OF AMERICA

-VS-

SIDNEY S. REYNOLDS

77 CR 291

-----X

VIOLATION OF PROBATION JUDGMENT

WHEREAS, defendant having pleaded guilty to charges that he purchased a shotgun in violation of T-18, USC Sec. 924(a) (Count 1) and possessing said shotgun in violation of T-18, USC, Sec. 1202 on June 4, 1974, in the Western District of Pennsylvania and,

WHEREAS, defendant was sentenced on July 30, 1974, to a term of five years pursuant to T-18, USC Sec. 3651, to serve four months, the balance of the term suspended and defendant placed on probation on count 1; and the court having suspended the imposition of sentence on count 2; and

WHEREAS, jurisdiction of probation having been transferred to this District on May 4, 1977, and,

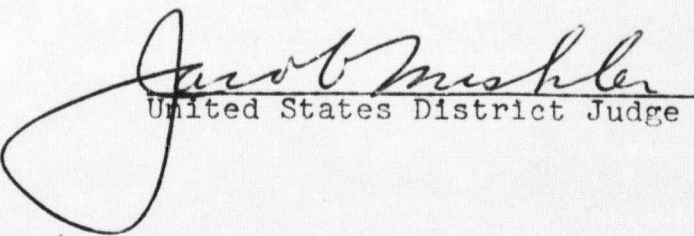
WHEREAS, defendant, on April 27, 1977, pleaded guilty in the New York State Supreme Court to a charge of grand larceny committed on Sept. 12, 1976, and,

WHEREAS, the Court held a hearing on a charge of violation of probation, the defendant being represented by Frank A. Bress, Esq. and the Court having filed a written memorandum of decision finding defendant violated probation and revoking probation, and,

WHEREAS, defendant appeared with counsel Frank Bress for sentencing on Nov. 4, 1977, defendant SIDNEY REYNOLDS is sentenced to the custody of the Attorney General of the United States or his duly authorized representative on Count 1 for a term of four years and eight months (being the balance of the term imposed on July 30, 1974); the imposition of sentence is suspended on count 2 and defendant is placed on probation for a term of two years, said probationary term to commence at the end of the prison term imposed on count 1 and it is,

ORDERED that the Clerk of the Court deliver certified copies of this Order to the U.S. Marshal and the Probation Department.

Dated: Brooklyn, New York
November 7, 1977


United States District Judge

RECEIVED
UNITED STATES ATTORNEY
OCT 23 1 57 PM '78
EASTERN DISTRICT
OF NEW YORK

*Paula
Gerson*